IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No. 332 of 2001

Judgment reserved on: 10.10.2007

Date of Decision: 31.10.2007

Sunil Keskar … Appellant

Versus

Smt. Sunita Keskar … Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting? ***No***

For the Appellant : Mr. Bhupender Gupta, Sr.Advocate
Mr. A.P.S.Jaswal, Advocate.

For the Respondent : Ms. Vandana Kuthiala, Advocate.

Deepak Gupta, J

This appeal by the husband under Section 55 of the Indian Divorce Act (hereinafter referred to as the Act) is directed against the judgment and decree passed by the learned Additional District Judge, Shimla in Case No. 35-S/3 of 1997, decided on 4.10.2001 whereby he has dismissed the petition for grant of judicial separation filed under Section 22 of the Act filed on the ground of cruelty. It would be pertinent to mention that during the course of the appeal, appellant/husband has filed CMP No.504 of 2000 praying that in view of the amendment made to the Indian Divorce Act vide Amendment Act 51 of 2001, the grounds which

were earlier available only for judicial separation are now the grounds available for grant of decree of divorce and, therefore, in case the appeal is allowed the husband/appellant may be granted decree of divorce instead of decree for judicial separation.

The undisputed facts of the case are that the marriage between parties was solemnized according to Christian law on 11.10.1991. Thereafter both the parties cohabited and lived together in Sanjauli, Shimla. Out of this wedlock one son was born on 8.9.1992. Here the dispute starts.

According to the appellant/husband, after the son was born, the attitude of the wife changed and become harsh and cruel towards him. He alleged that she used to tease and humiliate him that she would not do any work and as a result of the tension, the husband developed heart problems. It is further stated that the husband tried to persuade the wife to mend her ways especially her behaviour towards him and her family members but the behaviour became worse.

In the petition, it is alleged that in November, 1995, the wife along with her minor child left for Hoshiarpur where her parents were residing. She did not join the company of her husband and the husband and his family members went to Hoshiapur to bring her back. She failed to come back to join the company of her husband and thereafter the husband filed a petition for restitution of conjugal rights under Section 32 of the Act. Thereafter on the intervention of some relatives, she came back to Shimla in the month of March, 1996. The wife started residing with the husband on 6.3.1996 and on

13.3.1996 the petition filed for restitution of conjugal rights was compromised. The son was got admitted in a local public school at Sanjauli. However, the wife did not improve her behaviour. She did not speak to any member of the family. She used to prepare her own food and after cleaning the utensils, she used to visit her neighbour's house. There are general allegations of misbehaviour and it is also alleged that the wife never attended to the needs of the husband or her minor son. It was further averred that the wife used to avoid meeting friends and relatives of the husband and on 6.8.1997 when his cousin along with her husband came from England, the wife picked up a quarrel and abused her husband and other family members in the presence of the guests without any cause. It was also alleged that though the wife rejoined the company of the husband on 6.3.1996 but ever since 1995 till filing of the petition, the husband and wife are sleeping in separate rooms and there has been no sexual relations between them. It was also alleged that the wife has filed a complaint against her husband and family members and also with the department in which he is working. It is alleged that the wife leaves the house daily in the morning and spends the whole day out side her matrimonial home even though she is not employed anywhere. She prepares her meals late in the afternoon and then goes to the house of the neighbours.

The wife denied the allegations of cruelty and raised a plea that the husband and his family have been raising inordinate demands from her. It is further alleged that the husband's parents

and sister have been harassing and humiliating her and treating her in a very shabby manner.

Rejoinder was filed by the husband who reiterated the allegations made in the petition. On the pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether the petitioner is entitled for the decree of judicial separation as alleged? OPP

2. Whether the petitioner has no cause of action to file the present petition? OPR

3. Whether the petitioner is estopped from filing the present petition due to his acts, deeds, acquiescence attributed to him? OPR

4. Relief.

A perusal of the pleadings shows that the allegations of cruelty made against the wife are more general in nature than specific. The only specific allegations are with regard to the instance of cruelty which took place when the cousin of the husband visited his house. However, it is well settled law that cruelty in matrimonial matters is not defined by statute. It is a well established principle of law that the legal concept of cruelty is conduct of such character as to cause physical or mental danger to the life, limb or health of the other spouse or to give rise to reasonable apprehension of such danger. It is not necessary that harm should be physical only. Mental cruelty which disrupts matrimonial house is also a ground for divorce. Cruelty does not necessarily consist of violent acts only. Even hurtful and snide

remarks insulting and taunting behaviour, unwarranted complaints etc. when combined together may amount to cruelty. If any spouse without any rhyme or reason abstains from sexual intercourse, it may also amount to mental cruelty. Sex plays an important role in matrimonial life and is an integral part of married life. Therefore, the conduct of any spouse which renders the continuation of cohabitation and performance of conjugal duties impossible also amounts to cruelty.

Lord Denning in 1950(2) All. E.R. 398 (**Kalsefsky** v. **Kaslefsky**) held as follows:-

> "The willful and unjustifiable refusal of sexual intercourse is destructive of marriage, more destructive, perhaps, than anything else. Just as normal sexual intercourse is the natural bond of marriage, so the wilful refusal of it causes a marriage to disintegrate. It gives rise to irritability and discord, to nervousness and manifestations of temper, and hence to the breakdown of the marriage."

The Kerala High Court in **A** *versus* **B,** 1996 (1) H.L.R 602, held as follows:-

> "10. The legal concept of cruelty which is not defined by statute, is generally described as conduct of such character as to have caused danger to life, limb or health (Bodily or mental) or as to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. It may be mental, such as indifference and frigidity towards wife, denial of company to her, hatred

> and abhorrence for wife, or physical like act of violence and abstinence from sexual intercourse without reasonable cause."

It is in the light of the exposition of law that I proceed to examine the evidence in the above case.

I am not going to the allegations made upto the year 1996 since the acts of cruelty , if any, were condoned once the husband filed the petition for restitution of conjugal rights and compromised the matter.

The husband appeared as PW2. In his statement the husband has clearly stated that even after the wife rejoined his company on 6.3.1996, she did not prepare any food for him and even when he asked her to make a cup of tea, she would retort that she is not his father's servant. He also referred to the incident when his cousin came from England and the wife picked up a quarrel and abused him and his family members in front of his cousin. He also states that there is no sexual relationship between him and his wife even after she rejoined her company after 6.3.1996. According to him, he made several attempts to talk to the wife but she always responded by abusing him and picking up a quarrel with him. She also filed a complaint in the police station on 15.10.1997 against him and also made complaints to his department where he is working. He states that her wife used to leave the house in the morning and comes back in the evening.

PW4 is the father of the husband. He has supported his son. He has also made general allegations of misbehaviour towards family members by the wife.

PW5 Samriti Keskar is the sister of the husband. She is elder to the husband and was supporting his brother before he started serving. The husband who is her brother used to reside with her. Even after her brother got married, he and his family members were residing with her. She stated that since March 1996, the wife has not looked after the child at all. She stated that if she (wife) was asked to look after the child, she lost her temper and picks up a quarrel. A suggestion has been put to this witness that she is the root cause of the conflict between the husband and wife and she does not permit the child to remain with the mother. According to the wife, her sister-in-law wants that she should work as a slave and since she did not do so, she turned her brother and nephew against the wife. Suggestions have been put to her that after the marriage when the child was born in 1992, she and her brother had not permitted her (wife) to do any work for the child, This also suggests that the wife herself admits that she did not work for her child. Her version is that she was prevented from doing so by her husband and her sister-in-law.

Respondent-wife appeared as RW1. According to her, her sister-in-law used to trouble her and she used to instigate her brother against her. According to her, she used to do all the household work. She states that the office of her sister-in-law is at Kasumpti and her father-in-law mainly lives in Kotkhai where he has an

orchard. He comes to Shimla after one or two months. She alleges that when her child was three years old, her in-laws forcibly took away the child and, therefore, she filed two complaints in the police. According to her, when her husband's cousin came from England, no quarrel took place. In her statement, she sets up a new case that in 1997 her husband and her family left the residential house at Sanjauli and started living in some other house. In cross-examination, she has clearly admitted that she leaves the house at 9 in the morning and comes back at 5 in the evening. She, however, further stated that she does not go daily but only sometimes to meet Nishat Aunty. She further states that she started going regularly to the house of Nishat Aunty since she was unwell.

RW2 is the Uncle of the wife. His main deposition is about the compromise which took place and his statement is not very material.

RW3 is Anita Ishan. She states that she knows the wife. She is a well behaved person. According to her, since 1997, Sunita has been visiting her house when her mother-in-law was not well. Since her mother-in-law was unwell, Sunita remained the whole day at their house. Sunita used to cry and say that her husband and his family members are troubling her. In cross-examination, she admits that though Sunita was married in 1991, she never visited Sunita's matrimonial home. She also admits that Sunita's husband never came to her house. She also admits that Sunita used to come to her house in the morning and go back at 2 - 3 pm in the evening.

From the above evidence, it is apparent that the husband and wife along with their child used to live with RW5 sister of the husband. It is also apparent that parent's in-law of the wife used to live in the orchard but used to visit Shimla off and on . It is undisputed that both the husband and sister are government employees. The sister's office is at Kasumpti. It is thus apparent that both the husband and his sister must be leaving the house at 9 or 9.30 am to reach their office at 10 am and must have returned home only by about 6 pm. What was the reason for the wife to remain out of the house from 9.30 am to 5 pm everyday. She herself has admitted that she used to visit her aunt very often. Even RW3 has stated this. Assuming that her aunt (though no relationship has been proved) was unwell then also wife could not have been totally neglected her matrimonial home. She had a young child who in 1997 would have been 5 years of age. A five years old child would normally come back from school early in the afternoon. In case, as the wife projects, it was her husband and his family who were preventing her from meeting the child, what prevented her from looking after the child when both her husband and his sister were out side the house. This clearly shows that the story set up by the wife is totally false.

The learned trial Court has dealt with the evidence in very cursory manner. The entire evidence has not been discussed in detail and the trial court has held that since there are only general allegations of cruelty, no relief can be granted.

I am of the considered view that keeping in view the various factors viz. wife not taking care of the child even during the hours when her husband and sister were not at home; her misbehaviour with her husband; her avoidance of matrimonial duties and her admission that there has been no sexual intercourse between the parties ever since 1996; that the marriage between the two is totally a dead marriage. Admittedly, they have been residing separately for the last 10 years. They cannot be forced to live together. The various factors as stated above coupled with the fact that the wife filed complaints against her husband both in the police station and in the department and her behaviour towards them was quite rough, leads to the inevitable conclusion that the wife has treated the husband with cruelty.

Keeping in view the meaning of cruelty and testing the evidence in the present case on the touchstone on the well established principles laid down in various judgments, it must be held that the behaviour of the wife in the present case towards her husband is such which must be held to have caused reasonable apprehension in his mind that it is not safe for him to continue the matrimonial relationship with his wife. It is not a case of ordinary wear and tear in married life, but it has gone beyond that and assumed much more serious proportions.

One of the acts or incidents by itself may not be sufficient to prove cruelty. However, when all the acts are combined together. It is apparent that the wife by her behaviour treated the husband with cruelty.

The next question which arises is as to what relief the husband is entitled to under the un-amended provisions of the Divorce Act. Cruelty by itself was only a ground for grant of judicial separation. However, after the amendment of the Act, cruelty is now a ground for divorce. This amending Act came into force during the pendency of the appeal. It would not be worthwhile to drag the parties to another round of litigation on the same factual matrix. The entire evidence is on the record. The issue in the present case is whether the wife has treated the husband with cruelty and on the same grounds now he can claim divorce.

When a marriage is dead and all attempts of conciliation have failed and bitterness between the parties continues and re-union is impossible, then there is no point in continuing such a marriage. The continuance of such union would only force the parties to spend more time in agony and bitterness.

The Madhya Pradesh High Court in **Peter Messias** v. **Jennifer Messias,** AIR 2003 MP 214, held as follows:-

> "16. The "cruelty" was a ground for "judicial separation" as per S. 22 of the Indian Divorce Act, 1896. This Act has been amended by the Indian Divorce (Amendment) Act, 2001. Section 10 of the principal Act has been substituted by news S. 10. According to this section any marriage solemnized whether before or after the commencement of this Act may be dissolved on the grounds enumerated therein. The ground provided in Clause (x) of sub-section (1) of S. 10 is cruelty. There can be dissolution of the marriage if the respondent has treated the petitioner with such cruelty

> as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. This amending Act has come into force, during the pendency of this appeal and, therefore, the relief to be granted to the appellant can be moulded in view of the amended provisions in the Act. As stated above, it has been found that the defendant has been treating the plaintiff with cruelty and they are not living together for the last 11 years. The efforts to bring reconciliation between the two have failed. This is a clear case of irretrievable breakdown of the marriage and there is no use of keeping marital bond intact."

I am in respectful agreement of this judgment.

In view of the above discussion, it is held that the wife treated the husband with cruelty and they have not been living together for the last 10 years. Therefore, the appeal is allowed. The judgment and decree of the trial court are set aside. The marriage between the appellant/husband and the respondent/wife is hereby dissolved on the ground of cruelty provided in Section 10(1)(x) of the Indian Divorce Act as amended in 2001. Parties are left to bear their own costs.

October 31, 2007 (Deepak Gupta), J.

s.